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NO. 481

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

WAGGONER CARR,
Defendant-Appellant,

vs.

CITY OF ALTUS, OKLAHOMA, ET AL.,
Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

APPELLANT'S BRIEF OPPOSING MOTION TO AFFIRM

To The Supreme Court of the United States:

STATEMENT

Comes now Waggoner Carr, Attorney General of the State of Texas, Appellant herein, and files this Brief Opposing the Motion to Affirm under Rule 16 of the Rules of the Supreme Court of the United States. There are grave and substantial questions of law which require oral argument and full consideration by the Supreme Court of the United States in the case at bar because the opinion of the Three Judge District Court departs from logic, justice and established law to enter the forbidden field which Federal Courts have consistently refrained from entering; and has passed upon the unsettled nature of the title to

percolating underground waters under lands in the State of Texas. There is still a substantial question of law as to the nature of this title in underground water to be considered and decided in this direct appeal, for there can be no vested rights to capture in Appellees which would defeat the new Texas statute.

Appellees' Motion to Affirm in this case, really consists of a tacit recognition of the weakness of the opinion rendered below, for Appellees laboriously seek to justify a departure from established rules of law and attempt to justify shocking new principles of law which could destroy the underground water laws of the other sixteen western states, and perhaps destroy conservation and regulation of the oil and gas industry within this State of Texas, and all of this on the theory that actions of the State of Texas controlling withdrawal of ground water in any respect would burden, threaten and interfere with interstate commerce. Appellant in this case is in good company in urging validity of the Texas statute (Art. 7477b) because he stands with Mr. Justice Oliver Wendell Holmes and Mr. Justice Brandeis, and with the powerful dissent of Mr. Justice Black in *Hood vs. Dumond,* 336 U.S. 525 (1948).

ARGUMENT AND AUTHORITIES

Appellant advanced arguments and authorities to show that the Three-Judge Court should have abstained from exercising jurisdiction, that this case is really prohibited by the Eleventh Amendment to the United States Constitution, that such suit was premature and that exercise by the Texas Legislature of the State police power in enacting the statute in question was reasonable and lawful. These arguments and authori-

ties are again urged in answer to this Motion to Affirm and they are incorporated herein by reference to Appellant's Jurisdictional Statement as if fully set forth here word for word.

WHO OWNS UNCAPTURED GROUND WATERS IN TEXAS?

Appellees have asserted their absolute ownership of uncaptured percolating ground waters under the lands of the Appellees Mock and wife. Texas law has not definitely been settled on this point, as is shown by the following:

(1) *Houston and Texas Central Railroad vs. East,* 98 Tex. 146, 81 S.W. 279 (1904), is a non-liability case which really announces a "right of use" and not ownership of the underground water. It holds that in the absence of State regulation the man with the biggest pump can get the water without liability for depriving his neighbor of such water.

(2) *Texas Co. vs. Burkett,* 117 Tex. 16, 296 S.W. 273 (1927), concerns ownership of "diffused surface waters" before these waters enter a watercourse. On pages 277-78, it is plain that the Texas Supreme Court is talking about percolating waters which have emerged as springs and have thus become diffused "surface waters." It is noted also that the Court talks of a "right of use" only, not a right of property in the water.

(3) *Pecos County W.C. and I.D. No. 1 vs. Williams,* 271 S.W. 2d 503, (Civ. App., 1954, Error Ref. N.R.E.), shows that the action of the Texas Supreme Court, (our highest State Court), did not approve as law the loose statements of the intermediate Court of Civil Ap-

peals as to ownership by the landowner of underground percolating waters.

(4) *City of Corpus Christi vs. City of Pleasanton,* 154 Tex. 289, 276 S.W. 2d 798 (1955), directly concerned percolating underground waters and waste thereof. The highest State Court of Texas again avoids holding absolute "ownership," and holds there is a "right of use" by the landowner with the premise that such use is subject to the police powers of the State of Texas.

In the case at bar in which Appellees keep asserting a direct and absolute property interest in uncaptured percolating water flowing, oozing and filtrating under their lands, they go directly in the face of *Williams vs. City of Wichita, Kan.,* 190 Kan. 317, 374 Pac. 2d 578, appeal dism., 375 U.S. 7, reh. den. 275 U.S. 936 (1962) which had to do with the constitutionality of the Kansas ground water statute. This law was grounded and based on the right of the State to appropriate and control "uncaptured" ground waters. Texas has done this by enacting Article 7477b, supra, the statute which is here being reviewed. The Act of the Texas Legislature could have no other effect and make any sense. By dismissing the appeal in the Kansas case, the Supreme Court of the United States has definitely confirmed the principle on which Appellant's whole case now rests . . . i.e., that the Texas statute (Art. 7477b) has to do with a "substance" res communes or res publici which is not an article of commerce until it is captured and reduced to possession, an act which the Texas Legislature declared to be unlawful if the thing owned in common (uncaptured water) is to be carried outside of the State of Texas. *Geer v. Connecticut,* 161 U.S. 519 (1895); *Canada v. Shawnee,* 179 Okla. 53, 64 Pac. 2d

694 (1936); *Hudson County Water Company v. McCarter,* 209 U.S. 349 (1908).

The Three-Judge District Court in the case at bar did not and could not hold that the water was privately owned by the landowner of the overlying land. It skirted this question with dexterity and finally announced loosely that it did not make any difference to the Court whether the percolating water had been captured or whether it was wandering aimlessly underneath the owners' land; that any attempted State action to prevent withdrawal would constitute a burden on interstate commerce whether it had become personal property or not. This point alone is of such a substantial nature as to require oral argument and consideration by this Court in order to clarify the matters and the extent of the opinion which was rendered below. If such loose statements found in the opinion below are allowed to stand, Texas Courts will not have an opportunity to pass on the substantive issues of law with regard to ownership of underground percolating water beneath the lands in the State of Texas and the District Court's errors as to substantive law in their opinion.

Since the filing of the Jurisdictional Statement in this case the opinion of the United States District Court for the Western District of Texas, Austin Division, has been printed. *City of Altus, Oklahoma vs. Waggoner Carr,* 255 Fed. Supplement 828 (1966). In order to demonstrate that there are other substantial procedural questions of law, and that the Motion to Affirm ought to be overruled and oral argument allowed in this case, Appellant presents the following matters for the Court's consideration:

I. WHAT IS A "THREAT"?

The District Court below erroneously held that the mere existence of the statute was a "threat" as follows:

> "If the officer can, by declaring to act, enforce the statute, there is "threat" enough to take the suit without the provisions of the Eleventh Amendment. . . .
>
> True, the defendant has done no affirmative acts to enforce Section 2 of Article 7477b against the plaintiffs, but then he did not have to do so. The very presence of the statute itself and the possibility of its enforcement would preclude the plaintiffs from making further substantial expenditures of tax monies necessary to obtain and transport the water. . . ."

Even though we assume the correctness of past decisions which have sought to abrogate the plain intent of the Eleventh Amendment to the United States Constitution such a holding is not the law. No State is free from having its statutes questioned in Federal Courts if the declination to act, which is undisputed in this case, is a "threat." This holding destroys the Eleventh Amendment if allowed to stand.

II. WHO ENFORCES THE NEW STATUTE?

The District Court below erroneously held that Article 7477(11), V.C.S., gave the Texas Attorney General a duty to enforce Art. 7477b, V.C.S., (Motion to Affirm, page 11-12), as follows:

> ". . . this Court finds that the defendant herein meets the test set forth in Ex Parte Young in that he has 'some connection with the enforcement' of Section 2 of Article 7477b, . . ."

This is not even sound elementary law. Art. 7477b,

V.C.S., was given that codification number and put in that place and Chapter, by the Vernon Law Book Company, not the Texas Legislature. Art. 7477b, in no form, shape, or fashion, amends Chapter 1, of Title 128, nor is it in any way tied to Art. 7477(11). The District Court erred in this respect because there was no "duty to enforce." See Acts of the 59th Legislature of Texas, Regular Session, Chapter 568, pages 1245-46. Attention is respectfully invited to the fact that nowhere in this new statute is there given any direction to classify Art. 7477b as a part of Chapter 1, Title 128, of the Texas law. This question of law needs consideration even in light of the tenuous avoidance of the Eleventh Amendment by some past decisions.

III. IS THE STATUTE SELF-EXECUTING?

Appellee at page 14 of their Motion to Affirm, categorically state, that Art. 7477b, V.C.S., is "self-executing." Appellant denies this statement and suggests that such a view arises because of the District Court holding in this case as follows:

> "The very presence of the statute, itself and the possibility of its enforcement would preclude the Plaintiffs from making the further substantial expenditures of tax monies necessary to obtain and transport the water. . . ."

Mere enactment of the law does not create Federal jurisdiction, for if this be the rule, no State can invoke the Eleventh Amendment. All legislation objected to by any person will be hereafter called "self-executing" and all laws of the States will be "threats" to those citizens of other States who want to disobey such laws. This substantial question of law needs oral argument and consideration in the case at bar.

IV. IS THE TEXAS STATUTE A VALID EXERCISE OF THE POLICE POWER?

In distinguishing *Hudson County Water Co. v. McCarter,* 209 U.S. 349 (1908), the Court below and Appellee overlook the opinion of this Court speaking through Mr. Justice Oliver Wendell Holmes in which the controlling issue in that case is defined as the "police power" of the State. In answering the contention that the case should be decided on the basis of the "residuum of title" that the state may have had to the water in question, the Supreme Court of the United States speaking through Mr. Justice Holmes holds as follows:

> "But we prefer to put the authority which cannot be denied to the state, upon a broader ground than that which was emphasized below, since, in our opinion, it is independent of the more or less attenuated residuum of title that the state may be said to possess.
>
> . . . But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . .
>
> We are of the opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs.
>
> . . . the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all ad-

mit to be a great public good, and what it had it may keep and give no one a reason for its will.

> . . . One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

This holding should have been the holding of the Three-Judge District Court below not based on any theory of ownership of the water in the state, but based on the broader concept that the State has inherent power to insist upon a retention of its own natural advantages regardless of ownership, private or public.

We submit that the position taken by Mr. Justice Holmes is no doubt controlling today. One need only look at the many cases decided subsequent to the *Pennsylvania v. West Virginia* case in which this Court has upheld legislation enacted by the various states to protect the health, safety and welfare of its citizens, even though the legislation placed a direct burden on interstate commerce.

Cases such as *Hood & Sons v. Dumond,* 336 U.S. 525 (1949), *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923), and *West vs. Kansas Natural Gas,* 221 U.S. 229, can also be distinguished on one pertinent point. In cases such as these the Court always found as a prerequisite that the motivation in enacting the prohibitory legislation was to secure *"economic advantage"* for the inhabitants of the state enacting such legislation. This motivation is completely lacking in the instant legislation.

The record before this Court amply illustrates the need, and future need, of the Texas area for water.

Water is a resource that once it is expended, replacement cannot always be effected. There is no market in water. By its very nature and volume in which it is used, long range transportation is impossible. It can be judicially noticed that the lack of water can have violent disruptive effects on the health and safety of a particular geographical location as evidenced by the recent shortage of water in New York City. The fact that many portions of Texas are semi-arid and that droughts are commonplace in the Southwest has impressed the inhabitants of this State that preservation of its water transcends any economic consideration. Texas, along with other western states, has long been the leader in passing water legislation designed to protect this most precious natural resource.

The State duty to insure an adequate water supply for its citizenry cannot be disrupted. Legislation passed for this purpose is clearly within the police power of each sovereign state. The benefit sought by legislation of this type should be compared with the benefits derived from striking down legislation such as this as a burden on interstate commerce. To say that legislation of this nature places a burden on the interstate shipment of an item that has not historically been an item of commerce, and due to its physical characteristics will not likely become an item of commerce, would be a serious inroad into the power of the individual state to protect their citizens that would far outweigh the insignificant detriment to commerce between the States. That the movement of commerce should take precedence over the duty of each state to protect the safety and welfare of its citizens was never intended by the farmers of the Constitution and has not been so construed by this Court.

In support of their position that the statute here in question constitutes a burden on interstate commerce, Appellees below place sole reliance on cases such as *Pennsylvania v. West Virginia,* 262 U.S. 553, (1923) and *West v. Kansas Natural Gas Co.,* 221 U.S. 229, (1911). These cases were decided over 40 years ago and then not by a unanimous Court. Among the dissenters in each case were men such as Justices Holmes, Brandeis and Hughes, considered by most students of jurisprudence to be some of the most able legal scholars of their day. The dissenting positions in these natural gas cases is even more forceful when applied to water percolating undergound since ground water has not historically been an "item of commerce," nor will it likely become one in the future.

Mr. Justice Holmes in his powerful dissent in *Pennsylvania v. West Virginia,* 262 U.S. 553, (1923), made the following pertinent comment regarding the natural resources of a State:

> "I see nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages. If the gas were used only by private persons for their own purposes I know of no power in Congress to require them to devote it to public use or to transport it across state lines. It is the law of West Virginia and of West Virginia alone that makes the West Virginia gas what is called a public utility, and how far it shall be such is a matter that law alone decides. I am aware that there is some general language in *Oklahoma v. Kansas Natural Gas Co.,* 221 U.S. 229, 255, a decision that I thought wrong, implying that Pennsylvania might not keep its coal, or the northwest its timber, etc. But I confess I do not see what is to hinder. Certainly if the owners of the mines or

> the forests saw fit not to export their product the Constitution would not make them do it. I see nothing in that instrument that would produce a different result if the State gave the owners motives for their conduct, as by offering a bonus. However far the decision in the case referred to goes it cannot outweigh the consensus of the other decisions to which I have referred and that seem to me to confirm what I should think plain without them, that the Constitution does not prohibit a State from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its boundaries that otherwise would have passed outside. *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 357."

Even assuming, though not admitting, that the Act of the Texas Legislature is not a valid exercise of the police power, would it not be proper to assume that the Courts of the State of Texas would so find if given the opportunity to pass upon the statute.

What is the real meaning of Texas water laws in relation to Art. XVI, Sec. 59 of the Texas Constitution? Has not the Texas Supreme Court in its latest decision said that percolating waters are to be captured and used subject to the State police powers? Wherein does the State transcend the Federal Commerce clause by placing conditions on the capture of a "substance" which is not yet "property"? Can Texas act under *Geer,* supra, and *Hudson v. McCarter,* supra, to protect its water? Why does not Art. 7477b, V.C.S. constitute a change of a rule of property? These questions of law are substantial and real.

CONCLUSION

Wherefore, Applicant prays that this Court consider Appellants' Brief Opposing the Motion to Affirm, that said Motion to Affirm be overruled, that this Court enter its order noting probable jurisdiction, and that this cause be processed, heard and decided after oral arguments thereon.

Respectfully submitted,

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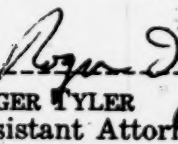

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PROOF OF SERVICE

I, Roger Tyler, one of the attorneys for Waggoner Carr, Attorney General of the State of Texas, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of October, 1966, I served copies of the foregoing Appellant's Brief Opposing Motion To Affirm on the several parties thereto, by mailing a copy in a duly addressed envelope, with first class postage pre-paid, to each of the following Attorneys of Record in this cause:

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